

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HP TUNERS, LLC,

Plaintiff,

V.

KEVIN SYKES-BONNETT, SYKED ECU
TUNING INCORPORATED, JOHN
MARTINSON.

Defendants.

Case No. 3:17-cv-05760-BHS

**REPORT AND
RECOMMENDATION ON
PLAINTIFF'S MOTION FOR
SANCTIONS FOR SPOILATION OF
EVIDENCE**

Plaintiff has moved for sanctions concerning spoliation of evidence. Dkt. 156. The evidence that plaintiff argues was destroyed is a portable flash drive. Plaintiff's Motion for Sanctions for Spoliation of Evidence, Dkt. 156 at 2, 156-3: Ex. 3 (plaintiff's demand to defendants and request for preservation of evidence, dated 3-27-2017); Dkt. 147, 147-1 at p. 139 (Sealed) Ex. A. The defense admits that the flash drive contained confidential and proprietary information relevant to this lawsuit, and admits that defendant Sykes-Bonnett destroyed the flash drive, but the defense opposes the motion. Defendant's Response, Dkt. 173. Plaintiff requests either default judgment against the defendants, or other relief the Court determines to be appropriate. Plaintiff's Reply, Dkt. 156 at 1, Dkt. 174 at 2.

Plaintiff and defendants agree: Defendant Sykes-Bonnett destroyed evidence, i.e. the flash drive and electronic contents of the flash drive, the defendant had notice that the evidence he destroyed had potential relevance to the litigation, and he knew this before he destroyed the

1 flash drive. Therefore, the Court finds plaintiff has met its burden of proof by a preponderance of
 2 evidence, that spoliation has occurred. *Ryan Editions Ltd. West*, 786 F.3d 754, 766 (9th Cir.
 3 2015); *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012).

4 The questions for the Court, under Fed. R. Civ. P. 37(e), are: Whether the ESI from that
 5 flash drive is “lost”; and under both Rule 37(e) and the Court’s inherent authority to control the
 6 discovery process and uphold the integrity of litigation -- if the ESI is lost -- then should the
 7 Court issue an order of default, or some other sanction, in response to the spoliation?

8 **Legal Standard**

9 The spoliation of electronic discovery is covered by Fed. R. Civ. P. 37(e), “which
 10 essentially functions as a decision tree”. *Oracle America, Inc. v. Hewlett Packard Enterprise
 Company*, 328 F.R.D. 543, 549 (N.D. Cal. 2018). As amended December 1, 2015 to clarify when
 11 United States District Courts should use certain measures to respond to allegations of spoliation
 12 of ESI, Fed. R. Civ. P. 37(e) provides:

14 If electronically stored information that should have been preserved in the
 15 anticipation or conduct of litigation is lost because a party failed to take reasonable steps
 16 to preserve it, and it cannot be restored or replaced through additional discovery, the
 court:

- 17 (1) upon finding prejudice to another party from loss of the information, may
 order measures no greater than necessary to cure the prejudice; or
- 18 (2) only upon finding that the party acted with the intent to deprive another party
 of the information’s use in the litigation may:
 - 19 (A) presume that the lost information was unfavorable to the party;
 - 20 (B) instruct the jury that it may or must presume the information was
 unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

21
 22 The decision tree starts with an inquiry of whether the data is forever gone: The Court
 23 must consider three questions to determine whether ESI has been “lost” – (a) did the
 24 discoverable ESI exist at the time a duty to preserve arose, (b) did the party fail to take

1 reasonable steps to preserve the ESI, and (c) is the evidence irreplaceably lost? *Oracle America,*
 2 *Inc. v. Hewlett Packard Enterprise Company*, 328 F.R.D. at 549. If the answer to any of these
 3 questions (a)-(c) is “no”, then a motion for spoliation sanctions must be denied. If all the
 4 questions are answered “yes”, then the Court proceeds to determine whether the moving party
 5 has been prejudiced and whether the party subject to potential sanctions had an intent to deprive.

6 The moving party is not required to prove the likely contents of destroyed evidence;
 7 information is not “lost” under Fed. R. Civ. P. 37(e) unless the moving party shows there are
 8 categories of irreplaceable relevant documents. *See e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951,
 9 959 (9th Cir. 2006); *Neely v. Boeing Co.*, 2019 U.S. Dist. LEXIS 68726 (W.D. Wash. April 23,
 10 2019) (information was not lost – plaintiff did not show that allegedly spoliated data could not be
 11 restored or re-constructed by making discovery requests of other potential custodians of data);
 12 *Alabama Aircraft Industries, Inc. v. Boeing Company*, 319 F.R.D. 730, 742-43 (N.D. Alabama,
 13 Southern Division 2017) (ESI was “lost” under circumstances where the defendant could not
 14 even identify some of the lost data, other ESI that could be identified was nevertheless not
 15 preserved, and the allegedly spoliated data could not be restored or found by conducting
 16 additional discovery).

17 District courts have inherent power to take action when a party destroys evidence, yet the
 18 Court must carefully determine whether a case-dispositive sanction is warranted, or a lesser
 19 remedy should be imposed. *Valley Eng’rs v. Electric Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir.
 20 1998). “Courts may sanction parties responsible for spoliation of evidence in three ways. First a
 21 court can instruct the jury that it may draw an inference adverse to the party or witness
 22 responsible for destroying the evidence. *See Glover v BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.
 23 1993) [...]. Second, a court can exclude witness testimony proffered by the party responsible for
 24

1 destroying the evidence and based on the destroyed evidence. *See, Glover*, 6. F3d at 1329;
 2 *Unigard Sec. Ins. Co. v. Lakewood Eng'g Mfg. Corp.* 982 F.2d 363, 368 (9th Cir. 1992). Finally,
 3 a court may dismiss the claim of the party responsible for destroying the evidence.” *UMG*
 4 *Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.)*,
 5 462 F.Supp. 2d 1060 (N.D. Cal. 2006); Fed. R. Civ. P. 37(e).

6 Dismissal or default is an appropriate sanction if a party acted deliberately, used
 7 deceptive practices, and thereby undermined the integrity of the judicial process. *Leon v. IDX*
 8 *Sys. Corp.*, 464 F.3d 951, 958-59 (9th Cir. 2006). The District Court must make a finding that the
 9 party’s acts were willful, the party was at fault, or there is a showing of bad faith. *Id.* And, the
 10 trial court must consider five factors when evaluating whether a case-dispositive sanction should
 11 be imposed: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to
 12 manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy
 13 favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.”
 14 *Id.*, quoting, *Anheuser-Busch v. Natural Beverage Distrib.,* 69 F.3d 337, 348 (9th Cir. 1995).

15 “Trial courts have widely adopted the Second Circuit’s three-part test which provides that
 16 ‘a party seeking an adverse inference instruction based on the destruction of evidence must
 17 establish: (1) that the party having control over the evidence had an obligation to preserve it at
 18 the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and
 19 (3) that the evidence was relevant to the party’s claim or defense such that a reasonable trier of
 20 fact could find that it would support that claim or defense.” *Apple v. Samsung Elecs. Co.*, 888 F.
 21 Supp.2d 976, 989 (N.D. Cal. 2012); *see also, Chen v. LW Rest., Inc.*, No. 10-CV-200, 2011 WL
 22 3420433, 2011 U.S. Dist. LEXIS 85403 (E.D.N.Y. August 3, 2011) at *9-*21 (defendant lost a
 23 flash drive, Court analyzed the three-part test and found that default judgment was not
 24

1 warranted; the Court determined an adverse inference jury instruction was warranted, and also
 2 awarded attorney's fees and costs to plaintiff).

3 **Factual Background**

4 This motion stems from the complaint for injunctive relief and damages against
 5 defendants filed on September 20, 2017. Dkt. 1. Plaintiff alleges that defendants
 6 misappropriated plaintiff's proprietary software, systems, source codes, reversed engineered the
 7 software, unlawfully sold thousands of credits for use in plaintiff's software, created and sold
 8 fraudulent application keys to unlock plaintiff's software, and publicly disclosed plaintiff's
 9 confidential information. Dkt. 35.

10 Defendant Sykes-Bonnett is the founder and a shareholder for Defendant Syked ECU
 11 Tuning Incorporated. Dkt. 147-1 at p. 41-42, 65-66 (Sealed) Ex. A. In 2016, Ken Cannata, a
 12 former owner for plaintiff, mailed Defendant Sykes-Bonnett a flash drive containing plaintiff's
 13 proprietary information. *Id.* at p. 131-132.

14 Defendant Sykes-Bonnett testified that he accessed the content of the flash drive but did
 15 not download any of the content onto any computer or software. *Id.* at p. 133, 136-37, 139. This
 16 information allowed Defendant Sykes-Bonnett to generate application keys to unlock plaintiff's
 17 software. *Id.* at p. 74-75. Defendant Sykes-Bonnett admits that he generated and sold application
 18 keys to unlock plaintiff's software both in person and through electronic means. *Id.* at p. 31, 33,
 19 134-36. The flash drive also contained additional files containing plaintiff's information, but
 20 Defendant Sykes-Bonnett does not remember what other files or information were on the flash
 21 drive. *Id.* at p. 75, 137, 147, 159-160.

22 In March 2018, while this litigation was pending, Defendant Sykes-Bonnett destroyed the
 23 flash drive, with a hammer. *Id.* at p. 139. At the time that Defendant Sykes-Bonnett destroyed
 24

1 the flash drive he was aware that he was required to preserve evidence relevant to this litigation.
 2 *Id.* at p. 140. In fact, Defendant Sykes-Bonnett had been expressly instructed to preserve and not
 3 destroy any materials, communications or documents relating to plaintiff. *Id.* at p. 284, See, Dkt.
 4 156-3 at p.2 Ex. 3. Additionally, prior to Defendant Sykes-Bonnett destroying the flash drive,
 5 plaintiff had served defendants with discovery requests to which the flash drive would have been
 6 responsive. Dkt. 156-2 at p. 7-8 Ex 2.

7 Despite knowing that he was obligated to preserve the flash drive and being requested to
 8 produce the flash drive, Defendant Sykes-Bonnett destroyed the flash drive. Defendant Sykes-
 9 Bonnett testified that he destroyed the flash drive because he became aware he was not supposed
 10 to be in possession of the flash drive and he “didn’t want anything to do with it anymore.” Dkt.
 11 147-1 at p. 139-140, 290. Notably, this is not the first instance of Defendant Sykes-Bonnett
 12 destroying potential evidence during the course of this litigation. *Id.* at p. 144, 288-289. Further,
 13 defendants have previously been sanctioned in this case pursuant to Federal Rule of Civil
 14 Procedure 11 for submitting uncorrected misrepresentations to the Court. Dkt. 155.

Discussion

I. Whether the Evidence Has Been “Lost”

17 First, the Court must determine whether the evidence in question has been “lost.” As was
 18 previously discussed, ESI has been “lost” when (a) the discoverable ESI existed at the time a
 19 duty to preserve arose, (b) the party failed to take reasonable steps to preserve the ESI, and (c)
 20 the destroyed evidence cannot be replaced. *Oracle America, Inc.*, 328 F.R.D. at 549. In the
 21 instant action the evidence contained on the destroyed flash drive has been lost.

22 Defendant Sykes-Bonnett possessed the flash drive during the course of this litigation and
 23 was given express instructions to preserve all relevant evidence related to plaintiff. Further,

1 Defendant Sykes-Bonnett admits that the flash drive contained information relevant to this
 2 litigation. Additionally, Defendant Sykes-Bonnett admits to intentionally destroying the flash
 3 drive and he did not take reasonable steps to preserve the information on the flash drive. Finally,
 4 there is no way of knowing the extent of the evidence contained on the flash drive and there is
 5 nothing in the record to indicate that the information is recoverable.

6 For the foregoing reasons, the ESI on the flash drive has been lost.

7 II. Prejudice and Defendant's Intent

8 Next, the Court must determine whether the moving party has been prejudiced and
 9 whether the party subject to potential sanctions had an intent to deprive. The undersigned
 10 recommends that the Court find that plaintiff has been prejudiced by Defendant Sykes-Bonnett's
 11 destruction of evidence. The undersigned further recommends that the Court find that Defendant
 12 Sykes-Bonnett acted with intent to deprive plaintiff of information.

13 "The prejudice inquiry 'looks into whether the [spoiling party's] actions impaired [the
 14 non-spoiling party's ability to go to trial or threatened to interfere with the rightful decision of
 15 the case.'" *Leon*, 464 F.3d at 959 (quoting *United States use of Wiltec Guam, Inc. v. Kahaluu*
 16 *Constr. Co.*, 857 F.2d 600, 604 (9th Cir. 1988)) (alteration in *Leon*, 464 F.3d at 959). Prejudice
 17 can be found where the refusal to produce or the destruction of evidence would force the moving
 18 party to rely on incomplete evidence at trial. See, *Leon*, 464 F.3d at 959.

19 Further, if a party destroys evidence with the intent to keep the ESI from the opposing
 20 party, prejudice is reasonably inferred. See, Fed. R. Civ. P. 37 advisory committee's note (2015);
 21 *Oracle America Inc.*, 328 F.R.D. at 549. A party's destruction of evidence can be considered
 22 willful or in bad faith when the party had notice that the evidence was potentially relevant to
 23 litigation before it was destroyed. *Leon*, 464 F.3d at 959.

1 Plaintiff is alleging that defendants misappropriated plaintiff's proprietary software,
2 unlawfully sold credits for use in plaintiff's software, and created and sold fraudulent application
3 keys to unlock plaintiff's software. Dkt. 35. Defendants have admitted that the flash drive
4 contained plaintiff's proprietary information which Defendant Sykes-Bonnett used to generate
5 and sell application keys to unlock plaintiff's software. Dkt. 147-1 at p. 74-75, 131-32; Dkt. 173.
6 The flash drive contained additional files containing an unknown amount of plaintiff's
7 information which can no longer be reliably identified. Dkt. 147-1 at p. 75, 137, 147, 159-60.
8 Finally, Defendant Sykes-Bonnett intentionally destroyed the flash drive despite having notice of
9 his obligation to preserve relevant evidence. *Id.* at 139-140, 284.

10 The evidence contained on the now destroyed flash drive was directly relevant to
11 plaintiff's claims. In fact, based on defendants' concessions, it seems that the evidence would
12 likely have supported some of plaintiff's claims. Because of Defendant Sykes-Bonnett's
13 admittedly intentional actions, it is impossible to ascertain what other evidence may have been
14 contained on the flash drive. Further, plaintiff must proceed with incomplete evidence.
15 Accordingly, the undersigned recommends that the Court find that plaintiff has been prejudiced
16 by the destruction of the flash drive.

17 Defendant Sykes-Bonnett was aware, that the information on the flash drive was relevant,
18 that he was obligated to preserve the evidence and that he was required to produce the flash
19 drive. Despite being aware of these facts, Defendant Sykes-Bonnett intentionally destroyed the
20 flash drive. Based on the foregoing, the undersigned recommends that the Court find that
21 Defendant Sykes-Bonnet willfully destroyed the flash drive with the intent to deprive plaintiff of
22 the information on the flash drive.

1 III. Appropriate Sanctions

2 a. Default Judgment

3 Dismissal or default is an appropriate sanction when the offending party acted
4 deliberately, used deceptive practices, and thereby undermined the integrity of the judicial
5 process. *Leon*, 464 F.3d at 958-59. To make this determination the trial court must consider the
6 following five factors: (1) the public's interest in expeditious resolution of litigation; (2) the
7 court's need to manage its docket; (3) the risk of prejudice to the party seeking sanction; (4) the
8 public policy favoring disposition of cases on their merits; and (5) the availability of less drastic
9 sanctions. *Id.*; *Anheuser-Busch v. Natural Beverage Distrib.,* 69 F.3d 337, 348 (9th Cir. 1995).

10 First, as was previously discussed, Defendant Sykes-Bonnett was aware that the content
11 of the flash drive was relevant to this litigation and was further aware of his duty to preserve and
12 produce the flash drive. The fact that Defendant Sykes-Bonnett destroyed the flash drive despite
13 this knowledge supports a finding that Defendant Sykes-Bonnet acted deliberately and in a
14 deceptive manner. Defendant Sykes-Bonnett deliberately violated the Federal Rules of Civil
15 Procedure and undermined the fact-finding process of discovery. Further, by destroying the
16 flash drive, Defendant Sykes-Bonnett has prevented the plaintiff from presenting all relevant
17 evidence in this action. Defendant Sykes-Bonnett's conduct has undermined the integrity of the
18 judicial process.

19 With regards to the five factors relevant to determining whether a terminating sanction is
20 justified, the first factor, the public's interest in expeditious resolution of litigation, favors a
21 terminating sanction. By destroying the flash drive Defendant Sykes-Bonnett has unnecessarily
22 delayed the resolution of this litigation by requiring additional discovery to try to identify and
23 recover some of the lost evidence. Additionally, Defendant Sykes-Bonnett's conduct has led to

1 motions that otherwise would have been unnecessary. The second factor is a neutral and does
2 not weigh in favor of either party.

3 The third factor weighs in favor of a terminating sanction. As was discussed in the
4 previous section, by destroying the flash drive, Defendant Sykes-Bonnett has prejudiced
5 plaintiff. Plaintiff is now unable to access all of the information that was previously contained in
6 the flash drive. Defendant Sykes-Bonnett's destruction of the flash drive has prevented the
7 plaintiff and the Court from knowing the full extent of defendants' admitted misconduct. The
8 fourth factor, the public policy favoring disposition of cases on their merits, weights against a
9 terminating sanction. Further, because less drastic sanctions are available to the Court, the fifth
10 factor also weights against a terminating sanction.

11 Because there are adequate less drastic sanctions available to the Court and because
12 public policy favors determining cases on their merits, the undersigned recommends that
13 plaintiff's request for default judgment be denied.

14 b. Other Available Remedies

15 The Court has discretion when ordering a sanction for spoliation of evidence; a finding of
16 intent to deprive another party of the lost evidence does not require the Court to adopt the
17 measure set out in Rule 37(e)(2) and does not limit the Court to those remedies. See, Fed. R. Civ.
18 P. 37 advisory committee's note (2015). The Court has the discretion to order a remedy that fits
19 the wrong. *Id.* For these reasons, the undersigned recommends that the Court grant an adverse
20 inference jury instruction with regards to the evidence that would have been discovered in the
21 flash drive. The undersigned further recommends that the Court order defendants to pay
22 plaintiff's attorney's fees and cost incurred in bringing this motion as well as any attorney's fees

1 and cost incurred by additional discovery, and plaintiff's preparation of a proposed set of adverse
 2 inference jury instructions that will be necessitated by the destruction of the flash drive.

3 An adverse inference instruction is justified when "(1) [...] the party having control over
 4 the evidence has an obligation to preserve it at the time it was destroyed; (2) [...] the records
 5 were destroyed with a culpable state of mind; and (3) [...] the evidence was relevant to the
 6 [moving] party's claim or defense such that a trier of fact could find that it would support that
 7 claim or defense. *Apple v. Samsung Elecs. Co.*, 888 F. Supp.2d 976, 989 (N.D. Cal. 2012); *see*
 8 *also, Chen v. LW Rest., Inc.*, No. 10-CV-200, 2011 WL 3420433, 2011 U.S. Dist. LEXIS 85403
 9 (E.D.N.Y. August 3, 2011) at *9-*21 (defendant lost a flash drive, Court analyzed the three-part
 10 test and found that default judgment was not warranted; the Court determined an adverse
 11 inference jury instruction was warranted, and also awarded attorney's fees and costs to plaintiff).

12 Prior to Defendant Sykes-Bonnett's destruction of the flash drive he had received a
 13 demand letter requesting the preservation of evidence, the litigation had commenced triggering a
 14 duty to preserve evidence and he had received discovery requests seeking production of the flash
 15 drive. Further, Defendant Sykes-Bonnett admitted to being aware of his obligation to preserve
 16 the flash drive at the time of its destruction. Accordingly, Defendant Sykes-Bonnett had an
 17 obligation to preserve the flash drive and was aware of that obligation when he destroyed it.

18 Additionally, as has been discussed throughout this Report and Recommendation,
 19 Defendant Sykes-Bonnett was aware of the flash drive's contents and relevance to plaintiff's
 20 claims. The fact that Defendant Sykes-Bonnett intentionally destroyed relevant evidence
 21 (substantive contents, as well as metadata associated with any electronic records) that was
 22 subject to and responsive to plaintiff's discovery requests supports a finding that Defendant
 23 Sykes-Bonnett destroyed the flash drive with a culpable state of mind.

1 Defendant Sykes-Bonnett has admitted that the flash drive contained plaintiff's
2 proprietary information which he used to generate and sell application keys to unlock plaintiff's
3 software. This information is directly relevant to plaintiff's allegations that defendants
4 misappropriated plaintiff's software and sold fraudulent application keys to unlock plaintiff's
5 software.

6 For the foregoing reasons, all of the elements necessary for an adverse inference
7 instruction have been met. The undersigned recommends that the Court grant an adverse
8 inference instruction; the Court should request that plaintiff propose instruction(s) informing the
9 jury of the existence of the flash drive, the information that defendants admit was on the flash
10 drive, that Defendant Sykes-Bonnett destroyed the evidence and allowing the jury to draw an
11 adverse inference against defendants based on these facts.

12 In addition to the adverse inference instruction, the undersigned recommends that the
13 Court order defendants to pay plaintiff's attorney's fees and cost incurred in conducting
14 additional discovery as a result of this spoliation and incurred in bringing this motion.

15 c. Defendants John Martinson and Syked ECU Tuning Incorporated

16 In addition to Defendant Sykes-Bonnett, Defendants Martinson and Syked ECU Tuning
17 Incorporated are also subject to this motion. Defendant Sykes-Bonnett is the founder of Syked
18 ECU Tuning Incorporated and one of the three shareholders. Dkt. 147-1 at p. 41, 85. Defendant
19 Martinson is another shareholder for Syked ECU Tuning Incorporated. *Id.* at p. 85. Defendant
20 Sykes-Bonnett is the CEO of Syked ECU Tuning Incorporated and acts on its behalf. *Id.* at 214.
21 The information on the flash drive could have contained evidence implicating all three
22 defendants in the misconduct alleged in this litigation. Further, all three defendants had an
23 obligation to preserve and produce the flash drive. Dkt. 156-2: Ex. 2; 156-3: Ex. 3. Therefore,
24

unless defendants submit evidence that Defendant Martinson was unaware of the flash drive's existence or otherwise mitigating any defendant's culpability in destroying the flash drive, the undersigned recommends the Court sanction all defendants equally.

Conclusion

Based on the foregoing, the undersigned recommends that the Court should GRANT plaintiff's motion for sanctions but DENY the requested sanction of default judgment.

The undersigned recommends that the Court give an adverse inference instruction informing the jury of the existence of the flash drive, the information that defendants admit was on the flash drive, that Defendant Sykes-Bonnett destroyed the evidence and allowing the jury to draw an adverse inference against defendants based on these facts. Additionally, the undersigned recommends that the Court order defendants to pay plaintiff's attorney's fees and cost incurred in conducting additional discovery as a result of this spoliation, fees and costs associated with preparing proposed adverse inference instruction(s), and fees and costs incurred in bringing this motion for sanctions.

The parties have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. 28 U.S.C. § 636(b)(1); Federal Rule of Civil Procedure (FRCP) 72(b); *see also* FRCP 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the above time limit, the Clerk shall set this matter for consideration on **October 4, 2019**, as noted in the caption.

Dated this 16th day of September, 2019.

Theresa L. Fruke

Theresa L. Fricke
United States Magistrate Judge